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December 7, 2002

Marlene Dortch, Secretary
 Office of the Secretary, Federal
 Communications Commission
 445 12th Street, SW
 Washington, DC 20554

RE: Public Comments (CG Docket No. 02-278)

As a small business person, I conduct my real estate brokerage activities out of my home office, as perhaps literally hundreds of thousands of real estate agents in this country now do. My fax machine has received hundreds of pages of unsolicited fax advertisements (junk faxes) over the past three years from over 50 different companies. Junk faxes are an absolute nightmare.

Many of the junk faxes I received are related to real estate, and all of these junk faxes result in a gross wasting my time, paper and other valuable resources, as stated in the legislative history of the *TCPA*. This *Comment* addresses the unsolicited fax issues of "express invitation or permission" and the invalid and outrageous nonlegislated FCC created "established business relationship" "exemption." The statute must remain in its original and simple language.

THE FCC SHOULD ADOPT THE
 THE ANALYSIS AND CONCLUSIONS
 OF A DISTRICT COURT RULING

After working on a civil action as the plaintiff for 2 ½ years, I recently prevailed when the Colorado Supreme Court denied defendant's petition for writ of certiorari. (The \$500 penalty on each of the 19 faxes was recently paid in full.) A copy of the district court four page ruling was previously submitted onto this record. A copy of the denial is attached.

This Supreme Court left in tact an El Paso County Colorado district court (sitting as an appellate court) ruling which directly overruled defendant's fabrication that voluntary publication of a co-member's fax number combined with co-membership in a nonprofit trade organization provided "express invitation or permission."

The district court judge concluded that "express invitation or permission" was intended to mean *express invitation or permission*. "Express" means express. It is my belief that this district court ruling is the first appellate opinion in the country to consider what congress intended "express invitation or permission" to mean.

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I respectfully request that the Federal Communications Commission adopt the relevant analysis, reasoning, logic and conclusions of the district court in *Virtual Realty Services, LLC v. Sullivan Hayes Brokerage Corporation* [Dist. Ct., El Paso County, Colorado, Div. 9, No. 01CV2193 (February 25, 2002); cert. den., Colo. Supreme Ct., No. 02SC188 (Oct. 7, 2002).]

THE FCC SHOULD ADOPT THREE POINTS TO CLARIFY “EXPRESS INVITATION OR PERMISSION

“Express invitation or permission” is clear and needs no change or interpretation by the FCC or by any court. Congress carefully picked those four words and the normal and common usage and meaning of those words are inherently clear and sufficient to put anyone and everyone on notice what is required, “express invitation or permission.”

Congress intended that there be no exemptions or exceptions to “express invitation or permission.” Therefore, all (potential) senders of unsolicited fax ads are treated exactly the same. At the same time, all (potential) recipients of faxed ads are also treated exactly the same. All persons know there is only one thing which allows fax ads to be legitimately sent, “express invitation or permission.” This four word crystal clear simplicity is critical for this statute to have its intended simple purpose and effect.

To bring the original legislative intent of congress forward and to emphasize the crystal clear “express invitation or permission” language **so** that no sender or attorney is going to pretend otherwise, I recommend the FCC clarify the law by explicitly adding the following truisms. “Express invitation or permission” does not equate to, nor is it created by: **1.** a potential fax recipient being a co-member of an organization in which a potential fax sender is also a co-member, nor, **2.** by the distribution or publication of a fax telephone number, nor, **3.** by an established or existing business relationship between a fax sender and the fax recipient.

AN ORGANIZATION MEMBERSHIP EXEMPTION WOULD VIOLATE **AND** EVISCERATE THE **TCPA** AND CREATE CHAOS

Congress easily could have, but specifically and purposefully chose NOT to include any exemptions or exceptions or exemptions to “express invitation or permission.” Congress could easily have included membership in an organization as an additional permission / defense to sending fax ads. It wisely and carefully chose not to.

If an **organization** membership exemption or exception were to be created, what kind of organizations? What is an organization? For profit or non-profit organizations? What **kind of** nonprofit organization, any IRS category? What if a nonprofit organization does not have a formal IRS designation or recognition? What if an organization does not have formal membership? What if one organization has different or varying purposes, products or services?

The innumerable cans of worms and civil actions that would result from the creation of a (trade) **organization** membership permission would violate the statute and the legislative intent itself. In the case of the civil action I won, defendant’s fantasy was that membership in a local real estate trade organization equated to “express invitation or permission.”

If that were the law, 2,400 real estate agents in the Pikes Peak region would have permission to fax out their thousands of real estate ads to the other 2,400 agents and offices. In the case of the Chicago Board of Realtors, I understand it has around 7,000 members, and so its 7,000 members would have permission to fax out its hundreds of thousands of real estate ads to co-members. That would be insanity and destroy the **TCPA** fax provisions.

These local real estate trade organization members are required to be members of their state trade organization, in Colorado, Colorado Association of Realtors (CAR). So that would mean that over 20,000 members of CAR would have **organization membership** permission to fax **out** their hundreds of thousands of fax ads annually to the other 20,000 members of CAR.

All Realtors® are also required to be a member of the National Association of Realtors (NAR). So **Organization membership** permission would mean that the hundreds of thousands of real estate agent NAR members would have permission to fax millions of ads to NAR co-members anywhere in a state or the country.

If trade **organization membership** permission is created, what kind of membership would constitute automatic permission, all types or categories of an organization membership? Would all of these different memberships be subjected to having to accept fax ads: active, inactive, student, affiliate, retired, honorary, part-time? What about a suspended member? **Most** of these categories of membership are presently available with my local real estate board. Would all categories of membership be treated the same or differently?

Chambers of Commerce are trade organizations. Large metropolitan and state chambers have thousands and thousands of members. It would gut the **TCPA** if a chamber member could fax any of their ads for whatever product or service they are selling to their chamber co-members. "The business advantage of a large trade association (membership) could be outweighed by the business interference and the inability to send or receive (desired) specific commercial faxes." *Virtual Really Services, LLC v. Sullivan Hayes Brokerage Corporation* [Dist. Ct., El Paso County, Colorado, Div. 9, No. 01CV2193, p. 2 (February 25, 2002).]

In fact, if an **organization membership** exemption or exception were created, people would join trade organizations to gain the "right" to fax their ads to other co-members. Faxing out local fax ads would cost almost nothing compared to mailing advertisements **out**.

ORGANIZATIONS CAN CREATE THEIR OWN FAX SENDING/ RECEIVING GUIDELINES AS A CONDITION OF MEMBERSHIP

Any organization can require as a condition of their own membership that a member inherently gives any other co-member an invitation and permission to fax ads to every other co-member. With all types of organizations having the right to **allow** or not allow its members to fax ads to other co-members, the protections of the **TCPA** will remain in place as intended for **most** everyone, because I believe that **most** organizations would not create such fax "rights."

In addition, every business person has every opportunity to have a fax ad "sign-up" sheet for their customers to sign on to if a customer wishes to get fax ads from a particular business, regarding whatever product or service - whether or not there is an established relationship.

CREATING AN **ORGANIZATION MEMBERSHIP** EXEMPTION WOULD ELIMINATE MEMBERSHIPS AND MEMBERSHIP DUES

If an organization membership exemption is allowed, then I will never join **our** local chamber of commerce. I want to join but I continue to put off joining until this **organization**

membership exemption is actively declared not the law.

I ~~still~~ have not renewed my membership in several non-profit organizations, including National Audubon Society and ~~our~~ local Cheyenne Mountain **Zoo**, after two El Paso County Colorado trial courts ruled that membership in a nonprofit trade organization equates to providing “express invitation or permission” or an “established business relationship,” allowing other co-members to send otherwise unsolicited fax ads to other co-members.

In the case of my not renewing my National Audubon membership, I did not want to begin receiving unwanted fax ads for bird houses or bird seed for sale, or whatever having to do with birds, as a result of my being a member.

It is true that both of these Colorado trial courts were considering co-memberships in a nonprofit **trade** organization. However, if expansion or other perversions of the perfectly clear federal statute by judicial action or by the Federal Communications Commission is forthcoming, one should protect their business and reduce or eliminate memberships in all types of organizations (nonprofit or for profit) to insure not receiving junk faxes as a result of such memberships.

Is that what the FCC wants to involve itself in, the discontinuation of memberships in (trade) organizations, and thereby reduce and eliminate payments of membership dues of people who do not want to join or continue one's membership?

OUTRAGEOUS THAT THE FCC
LEGISLATED AN **ESTABLISHED**
BUSINESS RELATIONSHIP EXEMPTION

I have always thought it outrageous that the FCC “determined” and ADDED the *established business relationship* exemption to the **TCPA** unsolicited fax ads provisions. [NPRM, FCC 02-250, p. 25, para 39.1 Congress carefully and precisely put that exemption in only one place – regarding “telephone solicitations” – only. [See 47 USC Sec 227(a)(3).]

That “determination” violated the spirit and intent of the **TCPA** and wrongfully convolutes an otherwise simple statute which is hard enough for a lay person to enforce. If the FCC swishes to eviscerate the fax ad provisions by requiring parties and the courts to litigate the meanings of “established” and “business” **and** “relationship,” then the **TCPA** fax provisions may as well be repealed. I ask the FCC to explicitly and quickly negate that “determination.”

In fact, I distinctly remember a version of the **TCPA** legislation which did not pass which included an *established business relationship* exemption relating to the unsolicited fax ads provisions. Congress eliminated the *established business relationship* exemption from the version it passed by taking that language **out**. Leave the statute alone - as it is - clear for all.

How a business or business person exercises their **First Amendment** rights to legally publishing and distributing their fax numbers is no one's business. However and whenever that is done, the **TCPA** was designed to protect those publication and distribution rights by prohibiting junk faxes in return after another snatches another's fax number from a business card, stationery, ~~off~~ the Internet, advertisement – or ~~from~~ a membership roster.

Respectfully submitted,


John Holcomb, Real Estate Broker

SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

CASE NO. 02SC188

CERTIORARI TO DISTRICT COURT,
EL PASO COUNTY, 01CV2193
COUNTY COURT, EL PASO COUNTY, 00C13556

Petitioner:

SULLIVANHAYES BROKERAGE CORPORATION,

v.

Respondents:

VIRTUAL REALTY SERVICES LLC and JOHN HOLCOMB.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the District Court, El Paso County, and after review of the record, briefs, and the judgment of the District Court,

IT **IS** THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 7, 2002.

cc:

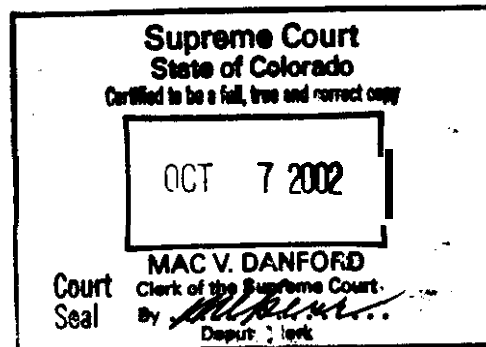
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Golden, CO 80401

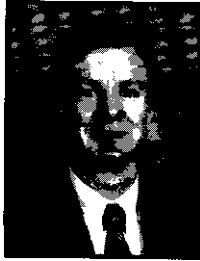
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P. O. Box 2980
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Honorable Douglas E. Anderson
District Court Judge

Honorable Stephen J. Sletta
County Court Judge





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